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Supreme Court, U.S.
FILED
MAY 5 1994
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IN THE
SUPREME COURT OF THE UNITED STATES

1993-1994 TERM

No. 93-1488

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

ANDRE MARTINEZ,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

and

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Of Counsel

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Criminal Appeals Bureau
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New York, New York 10038
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MOTION FOR LEAVE TO
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TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent, Andre Martinez, who is now held in Rikers Island Correctional Facility in the State of New York, asks leave to file the attached Opposition to a Petition for a Writ of Certiorari to the Court of Appeals of the State of New York without prepayments of costs and to proceed in forma pauperis. In the appellate courts of New York, respondent was represented by The Legal Aid Society of New York. Such counsel have agreed to represent respondent in this Court without expense

to him. Respondent's affidavit in support of the within application is annexed hereto.

Dated: New York, New York
May 5, 1994

Respectfully submitted,

Philip I. Weinstein

PHILIP I. WEINSTEIN
Counsel of Record

Irma B. Ascher

IRMA B. ASCHER
Of Counsel

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-against-

ANDRE MARTINEZ,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS UPON PETITION BY THE PEOPLE OF THE STATE OF NEW YORK FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

I, ANDRE MARTINEZ, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1) I am the respondent in the above-entitled case; 2) because of my poverty, I am unable to pay any costs of said case or provide security therefor; 3) I believe that the petitioners are not entitled to the redress they seek in said case.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay any costs of opposing the petition are true.

1. I am currently incarcerated at Rikers Island Correctional Facility in New York City for the purpose of court appearances following reversal of my conviction by the New York State Court of Appeals.

2. I have been incarcerated in the state prison system for over 4 years.

3. In the appellate courts of New York, I was allowed to proceed as a poor person and was represented by the Legal Aid Society of New York.

4. The approximate amount of my salary or wages at state prison per month was: $9.00.

5. Within the past twelve months I have received no income from any business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources, other than that stated in paragraph #4 above.

6. The total amount of money that I have in cash or checking, savings or inmate accounts is less than $10.00.

7. I own no real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and property).

8. There are no persons currently dependent upon me for support.

9. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

ANDRE MARTINEZ

Duly witnessed and sworn to
before me, a Notary Public,
this 21st day of April, 1994

CALVIN D. ATCHISON
Notary Public, State of New York
No. 03-4991338
Qualified in Bronx County
Commission Expires Feb. 3, 1996

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The respondent Andre Martinez respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the New York State Court of Appeal's opinion in this case. That opinion, People v. Martinez, is reported at 83 N.Y.2d 26 (1993).

JURISDICTION

Because no federal question was raised below nor decided by the Court of Appeals, this Court does not have jurisdiction to review the decision of that court. See 28 U.S.C. 1257.[1]

STATEMENT OF FACTS

Petitioner's "Factual Background" presumes the guilt of respondent (P5)[2], whose conviction has been overturned by the

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[1] See "Reasons for Denying Writ," infra.

[2] "P" refers to the pages of the petition for certiorari.

state's highest court because a misstatement to the jury of a state statute could have led to the conviction of an innocent person.

There were, as petitioner notes, three narcotics sales conducted in a Queens apartment within a three week period. Respondent had no proprietary connection to the apartment, but was present at the time of a raid which resulted in the arrest of all present and the charging of respondent, along with the two inhabitants of the apartment, with possession of a small amount of narcotics concealed therein as well as two sales which had earlier taken place there. The identification of respondent, by a single police officer, was hotly contested and the subject of a mass of contradictory testimony by that officer. The jurors were given the choice of convicting respondent of the possessory offense, which was tightly intertwined with the sales, either on lawfully stated grounds of constructive possession or on the basis of an improperly charged and inaccurately stated "drug factory" presumption.[3] A person uninvolved in the charged offenses could have been

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[3] The statutory presumption is quoted at the top of page 4 in the People's petition for certiorari. It instructs, in essence, that someone may be presumed to be in possession of narcotics in private premises if the drugs are in open view and in close proximity to that person and there is also evidence that the premises are being used as a drug factory. None of these conditions obtained in the instant case. The trial court not only charged the presumption, however, but also misstated it, telling the jury that the drugs need not be in open view nor close by, and failed to indicate that evidence of drug preparation also had to be visible at that time. The instruction thus rendered anyone innocently present in the apartment guilty of possession of the concealed drugs.

found guilty, based on the evidence presented at trial, if the jury followed the second alternative, the erroneously defined presumption. The jury convicted respondent without indicating which path it took.

The Appellate Division affirmed respondent's conviction, acknowledging the charge error but finding the theory of constructive possession the more convincing one and therefore holding the charge error harmless. The Court of Appeals, based on a long line of its own decisions (most recently, People v. Roberts, 72 N.Y.2d 489 (1988)), in agreement with the rationale of this Court's Stromberg/Yates rule, held harmless error analysis inapplicable, reaffirming its prior holdings that where it cannot be determined whether a jury convicted on lawful or unlawful grounds, and there existed evidence which would support either rationale, an appellate court may not be permitted to assume the role of factfinder in deciding which path was the more convincing one or the one more likely to have been taken by the jurors.

REASONS FOR DENYING WRIT

Since no federal question was raised by either party nor decided by the state Court of Appeals, this Court has no jurisdiction to review its decision. See 28 U.S.C. §1257; Hill v. California, 401 U.S. 797, 805-806 (1971); McGoldrick v. Compagnie Generale, 309 U.S. 430, 435 (1940). Indeed, petitioner fails to point to any portion of the record in which a federal question was put before the state courts. See

Rule 14.1(h)[4]; Webb v. Webb, 451 U.S. 493, 494 (1981). Moreover, the issue before the state courts was decided on independent and adequate state grounds. See Michigan v. Long, 463 U.S. 1032 (1983).

The Absence of a Federal Question

Petitioner characterizes the issue decided by the state Court of Appeals as a federal constitutional question, elucidating that question as whether Griffin v. United States, 112 S.Ct. 466 (1991), should apply where the evidence would be sufficient to support the verdict under the presumption as erroneously charged, but insufficient to have triggered the charging of the presumption in the first instance (P2). Petitioner further suggests that a federal question is raised by the fact that the instruction, as given, did not satisfy federal constitutional standards for a presumption (P3). Neither of petitioner's claims has support in the record.

The Court of Appeals found there were "two errors" of state law made by the trial judge (83 N.Y.2d 34, n3). He erred in the first instance by charging Penal Law §220.25(2)

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[4] Rule 14(h) of the Supreme Court Rules provides, in pertinent part, that petitioner "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears ... as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

"at all" (emphasis in original) when the statutory requirements for its provision had not been met ("the drugs were not in open view or found under circumstances" suggesting a drug factory operation) and, in the second instance, by failing to "track the statute" and extending its reach to innocent circumstances so that it "permitted the jurors to conclude that the requirements of the statute for finding that defendant was in knowing possession had been met," when in actuality they had not. Id.[5] The Court of Appeals held that since the twin errors would have produced an invalid verdict if the jurors proceeded by way of the unlawfully elucidated presumption, and there was no way to know whether they took that path or another, harmless error could not be applied.

Since the two defects addressed by the Court involved "only errors of state procedure or state law, ... the application of a state harmless-error rule (was) ... a state question." Chapman v. California, 386 U.S. 18, 21 (1967). No federal question was considered or decided.

Moreover, assuming arguendo that the applicability of Griffin, supra, was at issue, Griffin was not a case involving federal constitutional law; therefore, its application or non-

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[5] It was this misstatement of the law that petitioner tries to conceal in treating the "drug factory" presumption as if it had been accurately stated and in falsely alleging that the issue was therefore one of mere insufficiency of the evidence to support that presumption (P15-16). The evidence would, indeed, have been insufficient to support the presumption if it had been accurately stated, but the evidence was more than sufficient to elicit a guilty verdict based on the misstated elements of the statutory presumption.

application would not have constituted a federal question. Indeed, because the petitioner in Griffin tried to cast her claims in a constitutional mold, this Court took pains to analyze the bases of its own decisions in Griffin's precursors and rejected the suggestion that there were constitutional underpinnings to the question of whether harmless error is applicable when a general verdict may have been based on an invalid ground,[6] singling out as an exception only those particular instances "where a provision of the Constitution forbids conviction on a particular ground." Id. at 471. Thus, in the instant case, petitioner's allusions to Griffin do not satisfy their burden of demonstrating that the state courts decided a federal question.

Perhaps in realization of this failing, petitioner attempts to constitutionalize their complaints by putting forth the validity of the presumption, as elucidated, as a federal constitutional question (P3). This issue, however, never having been raised in the lower courts of New York

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[6] Petitioner Griffin set forth in her petition both the due process clause of the Fifth Amendment and the jury trial clause of the Sixth Amendment as bases for her claim that the general verdict against her was invalid because there was insufficient evidence to support one of the two alternative means by which the jury might have convicted her of the charged crime. This Court, after enunciating the historical development of the common law leading to the so-called Stromberg/Yates rule, id. at 470-473, which renders convictions invalid if they may have been reached through a "legally inadequate theory," id. at 474, rejected the claim that either jury trial, id. at 469, or due process concerns, id. at 470, governed Griffin's claims.

State, was not capable of review by the Court of Appeals,[7] and, indeed, was never addressed by that court. Since a litigant must follow state court procedures in raising a federal question before it can be brought before this Court, this issue is not here reviewable. See In re Lamkin, 355 U.S. 59 (1957); accord, Ferguson v. Georgia, 365 U.S. 570, 572 n.1 (1961); Hulbert v. Chicago, 202 U.S. 275, 281 (1906).

Independent and Adequate State Grounds

Since the New York State court unequivocally grounded its decision in state law, petitioner's reliance upon Michigan v. Long, 463 U.S. 1032 (1983), et alia, (P3) is misplaced. A "plain statement" by a state court that its decision rested on independent and adequate state grounds is mandated by Long only "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." Id. at 1042. Significantly, in Long, the Michigan Supreme Court cited no state cases to support its holding, but merely made a brief reference to the Michigan Constitution within an opinion saturated with federal precedent and references to the Fourth Amendment of the United States Constitution.

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[7] New York State requires that an issue be preserved (i.e. raised before the trial court) in order to be considered by the Court of Appeals. C.P.L.§470.05(2). The constitutionality of the "drug factory" presumption, as elucidated, was not raised before the trial court and was therefore not preserved for review by the Court of Appeals.

In the instant case, it is very "clear from the opinion itself" that the Court of Appeals, while indicating its agreement with Supreme Court decisions that a verdict based upon an invalid legal ground may not stand (83 N.Y.2d at 32-33), grounded its decision in state statutory requirements and in over forty years of state common law. Indeed, the court stated as much when it declared, "We believe that this conclusion is compelled under the rationale of the Supreme Court's decisions in Stromberg and Yates and our holdings in Roberts and Kaminski." 83 N.Y.2d at 34 (emphasis added). Noting that it had consistently set aside verdicts "where there was a possibility that [they] were based on an illegal ground which had support in the record" (83 N.Y.2d at 33), the state court highlighted as precedent its reversal of a judgment in People v. Roberts, supra, because it could not be determined whether the defendant's manslaughter conviction had been based upon the indictment's theory of a blow to the head or on the basis of a theory of strangulation, the latter uncharged and therefore unlawful under both the state constitution and state statute, both theories having support in the record (83 N.Y.2d at 33).

The court noted that in People v. Kaminski, 58 N.Y.2d 886 (1983), it had been guided by the same concerns, vacating a sodomy conviction where it was impossible to know whether the jury convicted on the grounds of physical compulsion, as charged in the indictment, or threats of force, uncharged and

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unlawfully presented to the jury, where, again support in the evidence presented. The court dis People v. Grega, the companion case to Roberts, i court held that it was there possible to attribut error to an improper legal instruction because the bereft of the factual conditions necessary for ap instruction and a rational jury could have determin instruction had no application to the facts adduce (83 N.Y.2d at 33-34).

The Court of Appeals further detailed some c contexts in which it had refused to apply harm analysis to an erroneous instruction that might hav unlawful verdict, even quoting from its decision i Kelly, 203 N.Y. 512, 517 (1951), in which the c provided both a correct and an incorrect instruct insanity defense:

> It is urged upon us ... that ... we should assume that the jurors -- each o the twelve of them -- followed the court

---

[8] As the Court of Appeals commented, had the c in the instant case provided the inapplicable "dr presumption in language which "tracked the statute error analysis would have been appropriate, as because the jury was capable of making th determination that the conditions necessary for a presumption (drugs in open view, defendant's p them, etc.) did not exist (83 N.Y.2d at 34, n.3). the trial court misstated the presumption, "applicable to anyone present in [the] apartment" at 37), and the jurors had no way of knowing tha was misinstructing them on the law, they could convicted respondent unlawfully, based upon his me in the premises.

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> when it was correct and disregarded the charge when it was incorrect ... [that they] had the wit and ability, with unanimity, to adopt the right one and reject the wrong one. We think the statement of the thought contains its refutation.

The Court also cited to cases which it had decided in widely different spheres, but all focusing on the commonality that an appellate court may not substitute itself for the factfinder by deciding what it might have done in the jury's place if forced to choose between two methods of determining guilt, when the jury has not itself indicated which method it used.[9]

* * * * *

Since no federal question was raised in or decided by the courts of New York State, and since the instant case posed a state question regarding the application of harmless error analysis to the erroneous provision and inaccurate elucidation

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[9] In addition to People v. Grega and Roberts, supra, and People v. Kelly, supra, already noted, the court cited to its holdings in: People v. Diaz, 19 N.Y.2d 547 (1967) (appellate court may not decide that there was sufficient independent evidence to corroborate accomplice testimony, when it is possible that jury, uninstructed on the statutory corroboration requirement, relied solely on testimony provided by accomplice); People v. Minarich, 46 N.Y.2d 970 (1979) (same); People v. Gallagher, 69 N.Y.2d 525 (1987) (appellate court may not determine which mental state defendant possessed when trial court mistakenly allowed jurors to consider two inconsistent mental states, in derogation of statutory prohibition, and it was impossible to know which of the two the jurors chose). The Court of Appeals also distinguished its own holdings in People v. Smalls and its companion case, People v. McGee, 55 N.Y.2d 407 (1982), wherein harmless error analysis was held applicable because the theory of guilt upon which the jury convicted was known to the reviewing court. See 83 N.Y.2d at 35.

of a state statute which was decided on independent and adequate state grounds, the requirements for review by this Court have not been met and this Court does not have jurisdiction to hear the instant case.

CONCLUSION

For the above reasons, the writ of certiorari should not be granted.

Respectfully submitted,

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IRMA B. ASCHER
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May 5, 1994

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CERTIFICATE OF SERVICE

I, Irma B. Ascher, a member of the Bar of this Court, hereby certify that on this 5th day of May, 1994, three copies of the Brief in Opposition to the granting of a writ of certiorari in the above-entitled case were mailed, first class postage prepaid, to Steven J. Chananie, Esq., Queens County District Attorney's Office, 125-01 Queens Boulevard, Kew Gardens, New York 11415 (phone 718-286-6940) counsel for petitioner herein. I further certify that all parties required to be served have been served.

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15 Park Row, 18th Floor
New York, New York 10038
212-577-3467

Counsel for Respondent

Irma B. Ascher

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